IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOSES SILVER,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
KLEHR, HARRISON, HARVEY,	:	
BRANZBURG & ELLERS, LLP, et al.,	:	**No. 03-4393**
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **July 28, 2004**

Presently before the Court is the motion of Defendants Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, Steven Kortanek, Esq., and David Zalesne, Esq. to replace Plaintiff Moses Silver with Mantel Investments Ltd. as the real party in interest, or alternatively, to dismiss the Complaint. For the reasons set forth below, the Court denies Defendants' motion.

I. BACKGROUND

This case is a legal malpractice and breach of contract action instituted by Plaintiff Moses Silver. Plaintiff is the purported assignee of all claims held by Mantel Investment Ltd. ("Mantel") against Defendants Klehr, Harrison, Harvey, Branzburg & Ellers, LLP ("Klehr, Harrison"), Steven Kortanek, Esq., and David Zalesne, Esq. (collectively "Defendants") regarding Defendants' legal representation of Mantel. (Am. Compl. ¶¶ 4, 9.) While the scope of Defendants' representation is bitterly contested, Plaintiff alleges that in March 1999, Mantel and an individual named Dan Dotan jointly retained Defendants to investigate any bankruptcy, securities, and/or RICO claims arising from Mantel and Dotan's respective security holdings in United Petroleum Corporation ("UPET"), which

recently had filed for Chapter 11 bankruptcy. (*Id.* ¶ 9.) Mantel was an unsecured creditor of UPET, and both Dotan and Mantel had purchased stock in UPET between May 1, 1996 and January 16, 1997. (*Id.* ¶¶ 8, 11.)

Plaintiff is one of the principals in Kensington Capital Corporation ("Kensington"), which was the stock brokerage used by Mantel to trade UPET shares. (Pl.'s Opp'n Ex. D.) Kensington paid Mantel's share of Defendants' initial $20,000.00 retainer fee (*id.* Ex. E), and Plaintiff communicated with Defendants during the course of their representation of Mantel. (*Id.* Ex. B, Ex. C, Ex. F.)

In or around February 2001, a settlement was reached in a federal securities class action brought on behalf of all persons and entities that had purchased UPET common stock from May 1, 1996 through January 16, 1997. (Am. Compl. ¶¶ 10, 12.) Defendants filed a proof of claim on behalf of Dotan but not on behalf of Mantel. Mantel allegedly did not learn of the settlement until the time to file a proof of claim had passed. In his Complaint, Plaintiff alleges that Mantel's claim would have been valued at $859,440.00. (*Id.* ¶¶ 13-18.)

On June 9, 2003, Ms. Shaindy Eichenstein, President of Mantel, signed, on behalf of Mantel, an "Assignment of All Claims." (Pl.'s Opp'n Ex. A.) The assignment states:

> For good and valuable consideration, [Mantel] hereby assigns, transfers and conveys to [Silver] . . . any and all claims and causes of action Mantel may have against [Defendants] arising from [their] representation of Mantel.

Id. Mantel assigned its claims against Defendants in exchange for "a 40% interest in any net proceeds therefrom." *Id.*

Now Plaintiff, as Mantel's purported assignee, brings this breach of contract and malpractice action against Defendants for failure to file a proof of claim in the UPET class settlement. Contesting the validity of the assignment, Defendants move this Court to substitute Mantel as the real party in

interest or, alternatively, to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 17.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 17(a) provides that every action shall be prosecuted in the name of the real party in interest.[1] *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250, 1278 (3d Cir. 1994). The impetus behind this rule "is to protect a defendant from a subsequent action by the party actually entitled to recover and to insure generally that the judgment will have its proper res judicata effect." *Nat'l Paragon Corp. v. Aberman*, Civ. A. No. 87-4454, 1987 U.S. Dist. LEXIS 11270, at *4, 1987 WL 27024, at *1 (E.D. Pa. Dec. 2, 1987) (*citing* FED. R. CIV. P. 17 advisory committee note; *Nagle v. Commercial Credit Bus. Loans, Inc.*, 102 F.R.D. 27, 31 (E.D. Pa. 1983)); *see also Beneficial Commercial Corp. v. Railserv Mgmt. Corp.*, 563 F. Supp. 114, 116 (E.D. Pa. 1983), *aff'd mem.*, 729 F.2d 1445 (3d Cir. 1984). "Generally, if a person has validly assigned all of his interest in a claim before an action is brought he is no longer the real party in interest." *Beneficial Commercial Corp.*, 563 F. Supp. at 116 (*citing Rodriguez v. Compass Shipping Co. Ltd.*, 617 F.2d 955 (2d Cir. 1980), *aff'd* 451 U.S. 596 (1981)); *Nat'l Paragon Corp.*, 1987 U.S. Dist. LEXIS 11270, at *4; *see also Gardner v. Surnamer*, 608 F. Supp. 13854, 1391 n.4 (E.D. Pa. 1985) ("It is well-

---

[1] Federal Rule of Civil Procedure 17(a) provides:

> Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest . . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

FED. R. CIV. P. 17(a).

established under Pennsylvania law that the real party in interest in an assigned suit is the assignee and not the assignor . . . where the assignment itself seems unequivocal." (citations omitted)) (collecting Pennsylvania cases). Under this rationale, however, if there is only a partial assignment, "both the assignor and the assignee have an interest in the claim and both are real parties in interest." *Beneficial Commercial Corp.*, 563 F. Supp. at 116 (citations omitted).

When faced with an action involving an assignment, a court must ensure that the plaintiff-assignee is the real party in interest with regard to the particular claim involved by determining: (1) what has been assigned; and (2) whether a valid assignment has been made. 6A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1545 (2d ed. 2004). In order to determine whether a valid assignment has been made, a court must turn to the substantive state law governing the assignability of the action at bar. *Id.* Under Pennsylvania law, "an assignment is 'a transfer or setting over of property, or of some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one whole interest in an estate, chattel, or other thing.'" *Fran & John's Doylestown Auto Ctr. v. Allstate Ins. Co.*, 638 A.2d 1023, 1025 (Pa. Super. Ct. 1994) (*citing In re Purman's Estate*, 56 A.2d 86 (Pa. 1948)). While consideration is required to support an assignment, lack of consideration does not render an assignment invalid. *Brager v. Blum*, 49 B.R. 626, 629 (E.D. Pa. 1985) (discussing assignments under Pennsylvania law). Rather, lack of consideration makes an assignment revocable, whereas consideration makes it irrevocable. *Id.*

III. DISCUSSION

In the present case, Defendants present three arguments in support of their motion.[2] First, they argue that the assignment is champertous, and thus, invalid. Second, they argue that if the assignment is deemed valid, it is only a partial assignment and thus, Mantel must be joined as a real party in interest under Federal Rule of Civil Rule of Procedure 19. Third, Defendants argue that even if the assignment is not deemed partial, Mantel is the real party in interest because the assignment is revocable.

A. Champertous Assignment

Defendants first argue that the assignment is invalid because it is champertous. Champerty has been defined as a "bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds." *See In Re Rite Aid Corp. Secs. Litig.*, 146 F. Supp. 2d 706, 716-17 (E.D. Pa. 2001) (*citing* BLACK'S LAW DICTIONARY 231 (6th Ed. 1990); *Ames v. Hillside Coal & Iron Co.*, 171 A. 610, 612 (Pa. 1934)). Champerty is also considered "a form of maintenance," which is in turn defined as "an officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend the litigation." *Id.* (*citing* BLACK'S LAW DICTIONARY at 954). Under Pennsylvania law, if an assignment is champertous, it is invalid. *Belfonte v. Miller*, 243 A.2d 150, 152 (Pa. Super. Ct. 1968). An assignment is champertous when the party involved: (1) has no legitimate interest in the suit, but for the agreement; (2) expends his own money in prosecuting the suit; and (3) is entitled by the bargain to a share in the proceeds of the suit. *Id.*

Plaintiff argues that Defendant's champerty argument must fail because assignments of legal

[2] The Court notes that although its Scheduling Order provided that all motions for joinder of additional parties were to be filed by February 6, 2004, the instant motion was not filed until June 25, 2004. Defendants were aware of the issues raised in the present motion from the beginning of this action and thus, had more than ample opportunity to raise them earlier.

malpractice claims are permissible and privity is not a requirement for an assignment of legal malpractice claims to be valid under Pennsylvania law. Plaintiff's argument has some merit in that under Pennsylvania law, "[a]n agreement can be regarded as champertous only when it is demonstrated that it does what the law does not allow." *Richettte v. Pa. R.R.*, 187 A.2d 910, 918 (Pa. 1963). The precise relationship between the doctrine of champerty and the assignment of legal malpractice claims under Pennsylvania law, however, is unclear. In its most recent decision regarding assignments of legal malpractice actions, *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 539 A.2d 357 (Pa. 1988), the Supreme Court of Pennsylvania was presented with the issue of whether privity should be a requirement for assignments of legal malpractice claims. *Id.* at 357, 359. While several courts have found that assignments of legal malpractice claims are impermissible because they would offend public policy, erode the attorney-client relationship, and promote champerty, the Supreme Court of Pennsylvania determined that assignments of legal malpractice claims were permissible and do not require privity because "[w]here the attorney has caused harm to his or her client, there is no relationship that remains to be protected." *Id.* at 359; *see also Ohio Cas. Ins. Co. v. Southland Corp.*, Civ. A. No. 98-6187, 1999 U.S. Dist. LEXIS 5564, at *8, 1999 WL 236733, at *3 (E.D. Pa. Apr. 22, 1999) (*citing Hedlund*); *DiMarco v. Lynch Homes-Chester County, Inc.*, 583 A.2d 422, 425 (Pa. 1990) (discussing *Hedlund*). Despite this holding, it is unclear whether the Supreme Court of Pennsylvania, in its 4 to 2 opinion, held that champerty is no longer a defense to an assignment of a legal malpractice claim. Therefore, the Court will determine whether the assignment is champertous.

Despite Defendants' argument to the contrary, the assignment at issue is not champertous because the first element is not met. *Id.* at 152 (holding that all three elements must be present for finding of champerty). While Defendants assert that Plaintiff has no legitimate interest in the suit apart

from the assignment, Plaintiff is no stranger to the suit. In fact, Defendants' own billing records show that from the beginning of their representation of Mantel, Defendants communicated with Mantel through Plaintiff. (Pl.'s Opp'n Ex. B, Ex. C, Ex. F.) In addition, Plaintiff is a principal of Kensington, which paid a portion of Mantel's retainer fee to Defendants. (*Id.* Ex. E.) Thus, it cannot be said that, but for the agreement, Plaintiff has no interest in the suit as it is clear from the record that Plaintiff was intimately involved with Defendants' representation of Mantel and has an interest in the outcome of the suit. Therefore, Defendants' first argument fails.

B. Partial Assignment and Revocability

Defendants assert that Mantel must be joined as the real party in interest because it retained a forty-percent interest in any recovery, and thus the assignment was only a partial assignment. (Def.'s Mem. of Law at 10-11.) Alternatively, Defendants argue that the forty-percent interest in the recovery is a "promise for future consideration" (*Id.* at 11), and therefore, Mantel must be joined as the real party in interest because the assignment is revocable due to lack of consideration.[3] These arguments fail, however, because they mischaracterize the assignment. First, the assignment unequivocally states that "[Mantel] hereby assigns, transfers and conveys to [Silver] . . .*any and all claims and causes of action* Mantel may have against [Defendants] arising from [their] representation of Mantel." (Pl.'s Opp'n Ex. A (emphasis added).) Therefore, the language of the assignment is clear that the assignment is not partial because Mantel does not retain any rights to bring claims against Defendants. *Gardner*, 608 F. Supp. at 1391 n.4 (noting that under Pennsylvania law, assignee is real party in interest where assignment is unequivocal). Second, when looking at the assignment, it is clear that the consideration

[3] Defendants have failed to cite any caselaw supporting the proposition that the forty-percent interest in any recovery would constitute a promise for future consideration or that future consideration is deemed a lack of consideration, which would make the assignment revocable.

provided to Mantel for the transfer of Mantel's rights was the assumption by Plaintiff of the time and burden of bringing the claim, as well as the risk of loss should the claim be unsuccessful. Therefore, the assignment was not only a full transfer of all rights, but it is also irrevocable as Plaintiff provided consideration for it. *Brager*, 49 B.R. at 629. As such, Plaintiff, as the assignee of claim, is clearly the real party in interest and Defendants' motion is denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOSES SILVER,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
KLEHR, HARRISON, HARVEY,	:	
BRANZBURG & ELLERS, LLP, et al.,	:	**No. 03-4393**
Defendants.	:	

ORDER

AND NOW, this **28th** day of **July**, **2004**, upon consideration of Defendants' Motion to Replace Silver with Mantel as the Real Party in Interest or, Alternatively, to Dismiss the Complaint, and Plaintiff's response thereto, it is hereby **ORDERED** that:

1. Defendants' Motion to Replace Silver with Mantel as the Real Party in Interest or, Alternatively, to Dismiss the Complaint (Document No. 30) is **DENIED**.

2. Defendants' Motion for Leave to File Reply Brief in Support of their Motion to Replace Silver With Mantel (Document No. 32) is **DENIED as moot**.

BY THE COURT:

_____

Berle M. Schiller, J.